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Nos. 83-376, 83-433

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-376

STANLEY YALKOWSKY, *et al.*,
Petitioners,

v.

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, WEISS & KOZUPSKY, a Law Partnership, *et al.*,
Respondents.

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Petitioner,

v.

J. HENRY NEALE, JR., JOHN H. BARRY, RICHARD L. GERLOFF, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SCARSDALE NATIONAL BANK AND TRUST COMPANY AND CERTAIN OF ITS DIRECTORS, OFFICERS AND EMPLOYEES

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SCARSDALE NATIONAL BANK AND TRUST COMPANY AND CERTAIN OF ITS DIRECTORS, OFFICERS AND EMPLOYEES

Respondents Scarsdale National Bank and Trust Company ("Scarsdale") and its directors, officers and employees (collectively referred to as the "Scarsdale Group") respectfully submit this brief in opposition to the petitions for writs of certiorari filed by plaintiff-petitioner Stanley Yalkowsky in the matters of Yalkowsky, et al. v. Shedler, et al. (No. 83-376) ("Shedler") and Yalkowsky v. Neale, et al. (No. 83-433) ("Neale").*

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* In Shedler, the Scarsdale Group, as named in the Complaint, consists of the following individual respondents in addition to Scarsdale: John Bruno, Thomas C. Kavanaugh, Lorraine T. Celio and Richard L. Gerloff.

In Neale, the Scarsdale Group, as named in the Complaint, consists of the following individuals in addition to Scarsdale: John H. Barry, Richard L. Gerloff, Frank M. Headley, Jr., Paul W. Knaplund, Jules Backman, Jackson B. Browning, Raymond J. Cantwell, Dorothy V. Griffin, John W. Johnson, Jr., Irving J. Kern, George C. Lawrence, Betty Menke, S. J. Schulman, Alfred P. Slaner, Thomas Kavanaugh and Lorraine T. Celio.

OPINIONS AND ORDERS BELOW

Petitioner seeks review in this Court of orders by the United States Court of Appeals for the Second Circuit rendered on June 17, 1983. Those orders are reproduced in Petitioner's Appendices (Shedler App. 15A; Neale App. 1A).

Petitioner has not reproduced the order by the Second Circuit dated August 8, 1983 which (a) denied petitioner's motion for reargument and (b) noted that no member of that Court had asked for a vote on petitioner's suggestion for rehearing in banc. One omnibus rehearing motion was made by Petitioner and decided below in both Neale and Shedler as well as a third companion case now also pending in this Court, Yalkowsky v. Mollen (No. 83-441). The Scarsdale Group is not a party to the Mollen action.

The Second Circuit and District Court decisions in Neale made it clear that Shedler and Neale were related, companion cases. Accordingly, the Scarsdale Group is submitting one brief to this Court in opposition to the petitions in both cases. The Second Circuit in Neale affirmed the opinion dated February 2, 1983 (Neale App. 4A) and a judgment dated and entered February 14, 1983 (Neale App. 28A) which were issued by United States District Court for the Southern District of New York and which dismissed the amended complaint in Neale ("Amended Complaint") with prejudice to filing any other amended complaint in either Neale or Shedler. In Shedler, the Second Circuit dismissed petitioner's appeal on the ground that the order appealed from, which had dismissed petitioner's complaint with leave to replead,

was not final and appealable. (Shelder App. 15A)

STATEMENT OF THE CASE

A. The Parties

Petitioner Stanley Yalkowsky is an attorney who is representing himself pro se in both Shedler and Neale. Between 1978 and 1981 Mr. Yalkowsky was involved in an apparently bitter divorce proceeding with his wife Deanne Yalkowsky (Napolitano). The judge and defense counsel in the divorce proceedings, as well as judges involved in many of his appeals, are defendants-respondents in either Shedler or Neale.

Dissatisfied with developments in his divorce proceedings, Mr. Yalkowsky has named all of these individuals as defendants in this action. Also named as defendants are Scarsdale upon which Mr. Yalkowsky had served subpoenae duces

tecum, some of its directors, officers or employees, its parent corporation, Irving Bank Corporation ("Irving") and its attorney.

B. Pleadings

Insofar as allegations against the Scardsale Group are concerned, the Amended Complaint in Neale was essentially a slightly edited rewrite of the original complaint filed in Shedler.* As we will discuss below, petitioner has numerous other similar related actions or proceedings pending in state and federal court.

The original complaint (Shedler) contained 755 paragraphs and 18 exhibits, was approximately 189 pages long and one

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* Petitioner has, inexplicably, not reproduced the pleadings in his appendices to this Court.

inch thick (Shedler 2d Cir. Rec.*). The complaint also sought removal of numerous state court actions to federal court. The complaint was dismissed without prejudice, but with leave to replead, by Judge Griesa on October 12, 1982 (See Shedler App. 1A-3A (order); 18A-26A (decision)). Rather than replead in that docket, Petitioner took an appeal. He also amended his complaint and attempted to use the Amended Complaint as a basis for commencing the Neale action. In so doing, plaintiff added some parties and dropped others.

The Amended Complaint was filed on December 30, 1982 (Neale 2d Cir. App. B 42). The Amended Complaint, like its predecessor, is extremely long, consist-

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* Reference to Petitioner's Appendices or Records on Appeal as filed with the Second Circuit will be cited herein as (Neale or Shedler 2d Cir. Rec. or App.).

ing of 245 rambling paragraphs. The Amended Complaint is, however, duplicative in every material respect of the Shedler complaint, at least with respect to allegations against the Scarsdale Group.

The gravamen of Mr. Yalkowsky's complaint against the Scarsdale Group is the claim that Scarsdale failed to fully comply with trial subpoenas duces tecum served on it during the course of Mr. Yalkowsky's divorce action in state court. The charges against the Scarsdale directors and officers are even more attenuated, since it seems that the essence of Mr. Yalkowsky's complaint is that they failed to take some undisclosed action well after the alleged failure to comply with the subpoenas. This discovery dispute is currently subject to further extensive litigation in the New York State courts.

Mr. Yalkowsky also appears to be complaining that Scarsdale and its tellers acted improperly in permitting his former wife to cash two checks which she had apparently altered or cashed without all proper endorsements. The face amount of the checks aggregated $3,100. Those checks were drawn by third parties in settlement of a personal injury action brought on behalf of Petitioner's daughter by Petitioner and her mother as guardians. Petitioner's daughter is now an adult who is also pursuing her claim in a New York State court proceeding. (See Neale 2d Cir. App. B 83)

Mr. Yalkowsky's amended complaint, while purporting to contain common law claims of fraud, deceit or negligence, refers to two federal statutes and one regulation but fails to state how the alleged conduct gives rise to a federal

cause of action against Scarsdale, its directors, officers or employees, or, for that matter, any of the other defendants. As set forth below, the federal statutory provisions clearly have no relation or applicability to the conduct alleged.

C. Related Litigation

As noted above, the actions on appeal are two of but numerous related actions or proceedings initiated by Mr. Yalkowsky and pending in various courts.

Yalkowsky v. Yalkowsky, Index No. 11741/78 (Sup. Ct. Westchester Co.).* At the heart of the many Yalkowsky federal and state actions, is the divorce action between Stanley and Deanne Yalkowsky,

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* This Court is asked to take judicial notice of these matters, all of which are matters of public record but not all of which are part of the records on appeal in these cases.

which is still subject to appeal on the merits. In September 1981, Mr. Yalkowsky moved, during the divorce action, to compel Scarsdale to comply with certain trial subpoenas duces tecum and to hold Scarsdale and certain of its officers and employees in contempt for failure to comply with the subpoenas.

In October 1981, Mr. Yalkowsky's motion to hold Scarsdale and its parent, Irving, in contempt and to compel compliance with his document requests was denied. Mr. Yalkowsky took an appeal from that decision. On April 11, 1983, the Appellate Division, Second Department of New York Supreme Court ("Second Department") issued a ruling affirming as to Irving and modifying the decision below to require Scarsdale to prepare and submit an affidavit specifying what information was provided, what information

it is willing to provide and what information it can or will not provide. 93 A.D.2d 834 (2d Dept. 1983).

Thereafter, Scarsdale complied with that order by submission of a lengthy affidavit and voluminous appendix. Dissatisfied with this affidavit, Mr. Yalkowsky moved the Second Department to hold Scarsdale and its affiant in contempt. That Court denied Petitioner's motion. Mr. Yalkowsky currently has pending (a) an appeal from that denial to the New York Court of Appeals, (b) a reargument motion to the Appellate Division and (c) an identical motion subsequently made to the lower court.

Scarsdale is also a respondent on an appeal to the Second Department from the denial of a subsequent motion by Petitioner during his divorce proceedings to hold Scarsdale and one of its officers in

contempt. Once again petitioner alleged in state court that Scarsdale contumaciously failed to comply with trial subpoenas duces tecum served on it.

However, on that appeal, the record is clear that Mr. Yalkowsky served those subpoenas on the penultimate day of a three week trial calling for production of all documents pertaining to numerous bank accounts over an eight-year period of time.* Moreover, on the first day of trial, the trial judge had warned Mr. Yalkowsky, who conducted that portion of the trial pro se, to issue new, proper subpoenas, to Scarsdale, but Mr. Yalkowsky waited three weeks to do so. Even when served, the subpoenas were techni-

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* That trial was the bifurcated second phase of Petitioner's matrimonial ltigation. Scarsdale was not called during the first phase although it was available for appearance, if needed, by telephone notice.

cally improper as they were unsigned and obviously burdensome on their face.

The trial judge, when alerted to this development, ruled against the subpoenas and, most importantly, during the trial Mr. Yalkowsky never called Scarsdale as a witness. Scarsdale's attorney appeared to contest the subpoenas after this series of events.

After the trial, Mr. Yalkowsky made the motion to hold Scarsdale and its officer in contempt; that motion was contested and denied on the merits. The order now subject to appeal was rendered on a motion made seven months after this denial. The issues on appeal, which has not yet been argued, are, therefore, whether the motion (a) was barred by the doctrine of res judicata or collateral estoppel; (b) was barred by the fact that Mr. Yalkowsky suffered no injury from

Scarsdale's alleged contempt since he had elected not to call it or its officer as a witness; and (c) should have been denied, in any event, since Scarsdale acted reasonably in response to the subpoenas.

Yalkowsky v. Napolitano, Index No. 42060/82 (Sup. Ct. N.Y. Co.), aff'd and app. dismissed, 94 A.D.2d 683 (1st Dept. 1983). In May 1982, Mr. Yalkowsky instituted a lawsuit in Supreme Court, New York County, against virtually the same group of defendants as in these cases. In the Napolitano action, Mr. Yalkowsky once again complained of Scarsdale's alleged non-compliance with the subpoenas and Irving's refusal to intervene in that dispute. The complaint also contains allegations relating to the alleged mishandling by Scarsdale of the two checks for the benefit of Mr. Yalkowsky's daugh-

ter. Irving moved to dismiss the complaint and its motion was granted in all respects. Scarsdale moved for clarification of the complaint and its motion was also granted. Mr. Yalkowsky appealed these rulings.

On May 24, 1983, the Appellate Division, First Department affirmed the dismissal of the complaint as to the Irving and state-official groups of defendants and dismissed the appeal from so much of the lower court order as directed Mr. Yalkowsky to replead as non-appealable. Mr. Yalkowsky sought and was denied reargument by the Appellate Division, and an appeal is now pending to the New York Court of Appeals.

Yalkowsky v. McPherson, Index No. 16411/74 (Sup. Ct. N.Y. Co.; Sup. Ct. Westchester Co.) (See Neale 2d Cir. App. B 83). In connection with the check

issues, Mr. Yalkowsky moved on behalf of his daughter, petitioner Peree Yalkowsky, to hold Scarsdale and certain of its employees in contempt for allegedly violating the court order settling the personal injury case. The proceeding is still being pursued by Peree Yalkowsky, pro se.

Yalkowsky v. Comptroller of the Currency, et al., 82 Civ. 4354 (RLC) (dismissed, S.D.N.Y. Mar. 15, 1983), app. pending, No. 83-6069 (2d Cir.) Mr. Yalkowsky sought a writ of mandamus directing the Comptroller of the Currency to forfeit Scarsdale's charter and an order directing the United States attorney to bring litigation against the Scarsdale Group. Judge Carter of the Southern District dismissed this complaint on March 15, 1983, and an appeal to the Second Circuit is now pending.

Yalkowsky v. Hon. Milton Mollen, et al., 82 Civ. 4611 (CES) (dismissed, S.D.N.Y. Feb. 17, 1983), aff'd, No. 83-7169 (2d Cir. June 17, 1983) pet. for writ of cert. pending, (No. 83-441). In this case Mr. Yalkowsky has sued numerous justices of the Appellate Division, Second Department and administrators of the Judicial Conduct Commission of New York State for failure to take disciplinary action against Justice Walsh. This complaint was dismissed by Judge Stewart, was affirmed by the Second Circuit and, as stated above, is now subject to a companion petition for a writ of certiorari to this Court.

In addition to actual litigation, Mr. Yalkowsky has filed grievances with various professional disciplinary committees and sought to invoke the involvement of various regulatory agencies (See Neale 2d Cir. App. 87-95).

In addition, in the instant petitions Mr. Yalkowsky has taken it upon himself to attack the conduct of Judge Van Graafieland of the Second Circuit and Judge Griesa of the Southern District of New York. These allegations as to Judge Griesa were entertained and denied by the Second Circuit in both the opinion below (Neale App. 1A-3A) and a subsequent proceeding initiated by Mr. Yalkowsky under 28 U.S.C. §372(c)(1) (Neale App. 60A) and, as to Judge Van Graafieland, denied in a subsequent proceeding under 28 U.S.C.§372(c)(1) (Neale App. 54A).*

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* It should not go unnoticed that Mr. Yalkowsky's outrageous conduct in this respect is consistent with the course of the entirety of the litigation in every court where he attacks all within reach. Moreover, Mr. Yalkowsky has violated 28 U.S.C. §372(c)(14) which requires that all such complaints and proceedings be sealed as to the identity of the judge. This misconduct is consistent

ftn. cont'd . . .

D. Prior Proceedings

As set forth above, when Judge Griesa dismissed the Shedler complaint on October 12, 1982, he directed plaintiff to submit any proposed amended complaint to him before service on any party so that he could approve it prior to service. (Shedler App. 1A-3A). Plaintiff took an appeal from that ruling but elected to amend the complaint under the guise of a new caption with a new docket number obtained by paying the requisite fee. The Second Circuit held that petitioner's appeal in Shedler should be dismissed as non-appealable and held in

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ftn. cont'd . . .

with Mr. Yalkowksy's violation of New York State laws which mandate that similar proceedings against attorneys or judges also not be revealed to the public unless disciplinary action is taken or the Court unseals the record. N.Y. Judiciary Law §§45 (judges), 90(10) (attorneys).

Neale that the appeal in that case included Shedler and that Judge Griesa had properly dismissed both cases.*

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* Petitioner's principal argument in Shedler appears to be that Judge Griesa should not have dismissed that complaint without reviewing it. At the outset, it should be observed that Judge Griesa examined the complaint and could easily and quite properly determine that its 189 pages, 755 paragraphs and voluminous exhibits could not, no matter how strained a reading were attempted, comply with Rule 8, Fed. R. Civ. P. that a complaint contain "a short and plain statement of the claim." Any argument by Petitioner that it was impossible for him to restructure the complaint is belied by his briefs to this Court and the Second Circuit wherein a much shorter exegesis has been attempted by Petitioner. Moreover, although Petitioner has inexplicably failed to present either the Shedler or Neale complaint to this Court, both Courts below had such documents in front of them when ruling on the matters. Thus, even if petitioner were correct that Judge Griesa erred by not reviewing the Shedler complaint in more detail, any such error was cured by his subsequent, exhaustive review of Neale and the Second Circuit's ability to review both complaints as part of the records on appeal.

The Amended Complaint (Neale) was filed on December 30, 1982 and submitted by plaintiff to Judge Griesa on January 3, 1983 (Neale 2d Cir. App. D 103). The case was transferred from Judge Stewart, to whom it had been assigned by virtue of the random assignment system of the Southern District of New York, to Judge Griesa by January 18, 1983 (Neale 2d Cir. App. D 110). Thereafter, Judge Griesa reviewed the entire Amended Complaint carefully and determined that the complaint failed to state any claim cognizable in a federal court (Neale App. 4A-14A).

At the outset, the Judge noted the above procedural history and ruled: "Plaintiff has sought to evade these directions. Instead of filing an amended complaint, he filed what purported to be

a new action." Judge Griesa concluded the opinion by ordering: "both of the captioned actions [Shedler and Neale] are dismissed. The dismissal of both actions is final. There will be no leave to file any further amended complaint." (Neale App. 14A) The appeal to the Second Circuit followed.

E. Summary of Background of Cases

Notwithstanding Petitioner's obvious efforts to contrive a federal or constitutional basis for pigeonholing extensive, continuing state court marital and discovery litigation, he simply cannot cram the facts of this case into a cognizable federal claim. Certainly, as is apparent, there is no reason for this court to exercise its certiorari jurisdiction in these cases.

Simply put, Petitioner's complaints involve his allegations of mishandling of

his divorce case in state court, a proceeding to which the Scarsdale Group was not party. Dissatisfied with the result there, he has sought retribution from all involved. As to the Scarsdale Group, however, it is clear that his allegations center on a discovery dispute under state procedures which is still winding its way through various levels of the state court system. To the extent he has pleaded the check issue (approximately $3,100 payable to his daughter allegedly mishandled by Scarsdale) his daughter is also pursuing her remedy in state court.

ARGUMENT

SUMMARY OF REASONS FOR DENYING THE WRITS

As is apparent from a review of the background of this matter, there is simply no special or important reason for this Court's review of the decisions below. Petitioner has asserted no such reason except to remonstrate in the most vague and conclusory terms. However, in order to put this matter in its proper perspective and to lay to rest Petitioner's arguments, the Scarsdale Group Respondents will briefly summarize below the prevailing, incontrovertible and uniform principles of federal law which, when applied to this case, mandate the conclusion that no cognizable federal claim was properly asserted by Petitioner below and that the procedural treatment of the cases below was proper in all respects.

I.
PETITIONER HAS NO CLAIM UNDER THE BANK ACT

Petitioner predicated subject matter jurisdiction on the purported violation by Respondents of §93 of the Bank Act, 12 U.S.C. §93.

A private right of action under 12 U.S.C. §93 has been permitted but only in cases (a) which involve violations of specific provisions of Chapter 2 of Title 12 and (b) only when the actions are brought by shareholders of the bank or by the bank itself. Harmsen v. Smith, 542 F.2d 496, 499-502 (9th Cir. 1976), after remand, 693 F.2d 932 (9th Cir. 1982).

Section 93 is, clearly, not intended to embrace any other chapter of Title 12, nor is it intended to embrace violations of any other federal or state law. Judge Griesa quite aptly synopsized the predominant reasons why Section 93 does not cover the claims at bar:

> This statute has no application to anything raised in the complaint in this action. "This chapter" refers to Chapter 2 of the National Bank Act. The provisions of Chapter 2 refer to the organization, capitalization, dissolution and other matters affecting the basic structure of a national bank. Chapter 2 does not cover claims on behalf of a depositor, or on behalf of the beneficiary of a deposit, with regard to a particular account. (Neale App. 12A)

To the extent that this section authorizes private rights of action, such a cause of action must allege a violation by the bank of the provisions of Chapter 2 of the Act. Thompson v. Kerr, 555 F.Supp. 1090, 1097 (S.D. Ohio 1982). In the case at bar, there are simply no such allegations.

Moreover, plaintiff lacks standing. The only parties having standing to sue under the statute have been held to be the bank itself suing an errant director (First National Bank of Lincolnwood v.

Keller, 318 F. Supp. 339 (N.D. Ill. 1970)); minority shareholders (Harmsen v. Smith, supra); and shareholders suing derivatively on behalf of the bank (Golar v. Daniels & Bell, Inc., 533 F. Supp. 1021 (S.D.N.Y. 1982); Seiden v. Butcher, 443 F. Supp. 384 (S.D.N.Y. 1978); Spalitta v. National Bank of New Orleans, 444 F.2d 291 (5th Cir.), cert. denied, 404 U.S. 883 (1971)). Each of these plaintiffs sued under a specific section of Chapter 2, charging specific defalcations of that chapter which resulted in damage to the bank itself and personal damage to plaintiff.

In the case at bar, not only is plaintiff not a shareholder, and, therefore, has no standing to sue, but plaintiff's complaint is essentially for a bank's handling of third party checks, an area governed by state law, and a bank's

response, as a non-party witness, to subpoena(s), an area exclusively governed by the law of the jurisdiction (here New York State) whose court issued the subpoena. In contrast, Petitioner, has not cited any specific violations of Chapter 2, nor could he. His claim falls directly under the prohibition of Golar v. Daniels & Bell, Inc., on issues traditionally and exclusively governed by state law, and, therefore, plaintiff has no right to a private cause of action under §93.*

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* Although referred to in his complaint, petitioner has eschewed reliance on 12 C.F.R. §7.5225 to validate a federal cause of action (Neale Pet. at 48-49).

II.
PETITIONER HAS NO COGNIZABLE CLAIM UNDER 42 U.S.C. §1983

Petitioner's Amended Complaint fails to state a claim under 42 U.S.C. §1983. Nowhere in the Amended Complaint is there an explicit allegation of a conspiracy in violation of Section 1983. Certainly no such allegation appears in the one paragraph which refers to that statutory provision (¶146) or with respect to the Scarsdale Group at all. Although paragraph 148 of the Amended Complaint states that Judge Walsh "acted in concert with Mrs. Yalkowsky and her attorneys and in concert with other defendants" (¶151), there is no specification of a conspiracy of the type contemplated by any case under §1983.*

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* The lack of specificity of any conspiracy also mandates dismissal of the Amended Complaint for failure to comply with Rule 9(b), Fed. R. Civ. P.

A similar failure in Shaffer v. Cook, 634 F.2d 1259 (10th Cir. 1980), cert. denied, 451 U.S. 984 (1981) resulted in the dismissal of an amended complaint. In a per curiam decision, the Tenth Circuit in Shaffer found that nothing in the complaint indicated that the Court or the attorneys "were acting outside the confines of the neutral function of a judicial forum." The Court further found that there was a failure to allege the kind of "conspiratorial nexus" between the judge and the attorneys that justified a cognizable §1983 claim. See also Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968):

> There is abroad in the land a notion that the Civil Rights Act has vested in the federal courts the function of an Ombudsman -- to review any grievance, no matter how petty, stemming from the aggrieved

party's unsuccessful results in state court litigation. Nothing could be further from the Congressional purpose.

Paraphrasing Judge Waterman's apt observation in Powell v. Workmen's Compensation Board, supra, [327 F.2d] at 137 (applied to the instant case):

> "Indeed, were we to hold this complaint sufficient, we would be inviting every party to a state proceeding angered at [adverse results in marital litigation] to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy." 281 F. Supp. at 207.

Plaintiff's complaint does not contain even a colorable claim under 42 U.S.C. §1983 and was properly dismissed on this ground.*

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* In Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), the Court held that, while a judge was insulated by judicial immunity, private parties accused of conspiring with the judge need not necessarily be dismissed from a Section 1983 case. Nevertheless, the Court emphasized that "merely

ftn. cont'd . . .

III.
PETITIONER HAS NO BASIS FOR ATTACKING THE JUDGES BELOW

Petitioner has continued his practice of claiming, so far as we can determine, that every judge who rules against him is biased and should be disqualified from sitting on his cases. He contends in Neale that Judge Griesa should have disqualified himself pursuant to 28 U.S.C. §§144, 455 since Judge Griesa had allegedly mishandled the prior Shedler case and thereby demonstrated bias against plaintiff. He also contends in both petitions that Judge Van

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resorting to the courts and being on the winning side of a lawsut does not make a party a co-conspirator or a joint actor with the judge." In Dennis, however, the plaintiff alleged, unlike the case at bar, that an official act of the defendant judge was the product of "a corrupt conspiracy involving bribery of the judge."

Graafieland of the Second Circuit acted improperly. The Second Circuit rejected both assertions.

Petitioner has not demonstrated, nor is there, any reason for Judge Griesa's disqualification. Since Petitioner has failed to indicate any facts justifying the extraordinary relief requested, there was simply no reason for Judge Griesa to disqualify himself.*

Disqualification of a judge from presiding over a particular proceeding is authorized only in certain limited circumstances. 28 U.S.C. §455(a), (b)(1).

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* Judge Griesa was merely ruling on the Amended Complaint as a matter of law. Thus, even if Petitioner were correct that he should have disqualified himself (a proposition with which these Respondents are in total disagreement), Petitioner suffered no prejudice because the Second Circuit had to review the sufficiency of the complaint as a matter of law in any event. Nevertheless, as demonstrated below, disqualification of Judge Griesa was clearly not warranted.

It is well settled that the disqualification of a judge under either of these subsections must be based upon actions or factors which are extrajudicial in nature rather than those which arose during the legal proceeding itself. Thus, in In Re International Business Machines Corporation, 618 F.2d 923, 929 (2d Cir. 1980) (footnote omitted), the Court "conclude[d] that under Section 455(a) the bias to be established must be extrajudicial and not based upon in-court rulings." Accord United States v. Haldeman, 559 F.2d 131, 132-33 n. 297 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); Blizard v. Fielding, 454 F. Supp. 318, 321 (D. Mass. 1978), aff'd, 601 F.2d 1217 (1st Cir. 1979); cf. Lazofsky v. Sommerset Bus Co., Inc., 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975). In Re IBM Corp., supra,

618 F.2d at 928; United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977); United States v. Scaccia, 514 F. Supp. 1353, 1355 (N.D.N.Y. 1981).

Every contention which Petitioner asserts as a basis for Judge Griesa's disqualification arose from the proceedings in this matter and not from any extra-judicial source. Accordingly, there is absolutely no legal or factual basis upon which Judge Griesa should have disqualified himself from the matter. Moreover, as set forth in the Second Circuit decision on Petitioner's complaints against both Judges Griesa and Van Graafieland, these complaints were determined to be absolutely without merit.

IV.
THE ORIGINAL AND AMENDED COMPLAINTS FAILED TO COMPLY WITH RULES 8(c) AND (e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND WERE PROPERLY DISMISSED

A case very much on point is Echols v. Voisine, 506 F.Supp. 15 (E.D. Mich. 1981), in which the district court dismissed an amended complaint with prejudice. The pro se plaintiff in Echols filed a complaint alleging "on-going violations of his civil rights, apparently in the form of an ever widening conspiracy to discriminate against him on the basis of race and to deny him his rights to due process." Id. at 16. The plaintiff's original complaint in Echols was forty-five pages in length, while his second complaint was reduced to fourteen. The district court, nevertheless, found that, although the Amended Complaint more nearly approached the requirements of Rule 8, the document con-

tinued to be "verbose, confusing and certainly not 'simple, concise and direct.'" Id.at 17.

The Court concluded that plaintiff's repeated failure to draft a proper complaint justified dismissal with prejudice. In dismissing the complaint, the court noted:

> Furthermore, as a matter of policy, the Court believes that a dismissal on the merits is proper in a case such as this for two reasons: first, to deter frivolous claims couched as civil rights violations, Slotnick v. Stavisky, 560 F.2d 31, 33 (CA 1, 1977), cert. denied 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1977), especially when such are allegations of a giant conspiracy resting only upon conclusory statements, Ellingburg v.King, 490 F.2d 1270, 1271 (CA 8, 1974); and second, to avoid attempts to have federal courts retry civil rights issues once put to rest by the State courts. Id. at 19.

The Court also noted that, as in the case at bar, the plaintiff had several actions pending at the appellate and trial levels

of the state courts in Michigan and that much of the litigation involved the same underlying facts and allegations as the federal action.

Other cases supporting dismissal with prejudice include: Pesno v. Coopers & Lybrand, 92 F.R.D. 765, 770 (S.D.N.Y. 1981); accord In re "Santa Barbara Like It Is Today" Copyright Infringement Litigation, 94 F.R.D. 105, 109 (D. Nev. 1982); see, e.g., Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981); Schmidt v. Herrmann, 614 F.2d 1221 (9th Cir. 1980); Smith v. International Longshoremen's Association, 592 F.2d 225 (4th Cir. 1979).*

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* See also on Rule 8 stadards: Koll v. Wayzata State Bank, 397 F.2d 124, 126-127 (8th Cir. 1968); Corcoran v. Yorty, 347 F. 2d 222, 223 (9th Cir. 1965), cert. denied 382 U.S. 966 (1964); Agnew v. Moody, 330 F. 2d

ftn. cont'd . . .

Petitioner's Complaints simply failed to satisfy the requirements of Rule 8, and, in the context of this case, dismissal with prejudice would have been appropriate on this ground.

V.
RESPONDENTS SHOULD BE AWARDED DAMAGES FOR RESPONDING TO FRIVOLOUS PETITIONS

The conclusion is inescapable that the petitions for writs of certiorari as filed with this Court by Mr. Yalkowsky are utterly and totally without merit. Accordingly, pursuant to this Court's

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868, 870-71 (9th Cir. 1964); Brainerd v. Potratz, 421 F.Supp. 836, 839 (N.D. Ill 1976), aff'd, 566 F.2d 1177 (8th Cir. 1977); Burton v. Peartree, 326 F.Supp. 755, 759 (E.D. Pa. 1971); Friedman v. Younger, 46 F.R.D. 444, 446-447 (C.D. Ca. 1969); United States ex rel. Holland v. Maroney, 299 F. Supp. 262, 263 (N.D. Ca. 1969); Jemzura v. Belden, 281 F. Supp. 200, 204 (N.D. N.Y. 1968).

Rules (Rule 49.2), Respondents should be awarded appropriate (in the circumstances of these cases, substantial) damages for having to respond to the frivolous petitions.

CONCLUSION

For all of the foregoing reasons, no writ of certiorari should issue from this Court and the petitions should be denied.

Respectfully submitted,

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